

# Conflicts of Interest



The Political Reform Act &  
The 1090 Pilot Project (AB 1558)

## *The Political Reform Act*

Adopted by the voters as an initiative in 1974. Only amended by:

- Another initiative measure, or
- A 2/3rd vote of the legislature so long as the change furthers the purposes of the Act.



# *Purposes*

"The act seeks to protect all citizens from those who might govern in a financially self-interested manner. Public officials should perform their duties in an impartial manner free from the pressures and bias caused by their own financial interests."

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*Consumers Union of U.S., Inc. v.  
California Milk Producers Advisory Bd.*  
(1978) 82 Cal.App.3d 433.

## *More....*

"The PRA seeks to bring a degree of credibility to government by providing that those who hold a public trust must act, and appear to act, ethically. Erosion of confidence in public officials is detrimental to democracy.... To maintain confidence and to avoid public skepticism, conflicts of interest must be shunned."

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*Consumers Union of U.S., Inc. v.  
California Milk Producers Advisory  
Bd. (1978) 82 Cal.App.3d 433.*



## § 87100

No **public official** at any level of state or local government shall **make, participate in making** or in any way attempt to use his or her official position to **influence** a governmental decision in which he or she knows or has reason to know that he or she has a financial interest.

## § 87103

A public official has a financial interest in a decision if it is **reasonably foreseeable** that the decision will have a **material** financial effect, **distinguishable from its effect on the public generally**, on the official, a member of his or her immediate family, or on any **"economic interest."**



## *The 8 Steps (Steps 1-6: Conflicts of Interest.)*

**Step 1:** Is the individual a *public official*?

**Step 2:** Is the official *making, participating or influencing* a governmental decision?

**Step 3:** What are the official's *economic interests*?

**Step 4:** Is the economic interest *directly or indirectly* affected by the decision?

**Step 5:** How will the economic interest be affected? (*Material financial effect?*)

**Step 6:** Is it *reasonably foreseeable* that the economic interest will be materially affected?  
Is the decision interrelated or is it segmentable?



## *The 8 Steps (Steps 7 & 8: Exceptions.)*

**Step 7:** If the economic interest will be materially affected, will the decision affect the official's economic interest in substantially the same manner as it will affect a significant segment of the *public generally*?

**Step 8:** If not, are other officials also disqualified so that the "*legally required participation*" rule applies?



## *Step 1: Is the Individual a "Public Official"?*

The term "**public official**" includes every member, officer, employee or consultant of a state or local agency.

**Exception:** Unsalaries membership on a solely advisory board/commission does not by itself make an individual a public official.

## Step 1: Consultants

A "**consultant**" is a person under contract with an agency who either:

- Makes specific governmental decisions, or
- Serves in a staff capacity and in that capacity *participates* in making governmental decisions; or performs the same/substantially the same functions as a position specified in the agency's conflict of interest code. (Reg. 18701(a)(2)(B).)



*Step 2: Is the Official Making, Participating in or Using His/Her Position to Influence a Governmental Decision? An official "makes" a decision when he/she:*

- Votes on a matter;
- Appoints a person to a board or commission;
- Obligates/commits the agency to a course of action;
- Enters into contractual agreements; or
- Determines not to act because of a conflict.



*Step 2: "Participates" without significant substantive review negotiates, or advises/makes recommendations to the decisionmaker by:*

- Conducting research/making an investigation which requires the exercise of judgment and the purpose of which is to influence a decision;
- Preparing/presenting any report, analysis, or opinion which requires the exercise of judgment and the purpose of which is to influence the decision.



## *Step 2: An Official "Influences" a Decision When the Official:*

- Contacts, appears before, or otherwise attempts to influence any member, officer, employee or consultant of his/her agency regarding a decision before the agency or an agency appointed by/subject to the budgetary control of his/her agency.
- For all other decisions, the official "influences" if the official acts or purports to act on behalf of, or as the representative of, his/her agency for the purpose of influencing the decision.



*Step 2: Exceptions: There are a variety of exceptions to these definitions, including:*

- Actions of public officials which are solely ministerial, secretarial, manual, or clerical;
- Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official's personal interests.



## *Step 2: New Rule*

### *Leave the Room Requirement*

- Applies to 87200 filers (county supervisors, county counsels, etc.)
- If you are disqualified you must comply with new rules which require you to announce your conflict of interest and leave the room when the decision is presented.
- In limited circumstances, however, you may speak as a member of the public.

### *Step 3: What Are the Official's Economic Interests? (Six types)*

- Business entity in which the official or a member of his/her immediate family has an investment of \$2,000 or more.
- Business entity in which the official is a director, officer, partner, trustee, employee, or holds any position of management.



### *Step 3: Economic Interests (Cont.)*

- Real property in which the official or a member of his or her immediate family has an interest worth \$2,000 or more.
- Sources of income (other than commercial loans) aggregating \$500 or more, received or promised to the official within 12 months prior to the time the decision is made.

### *Step 3: Economic Interests (Cont.)*

- Sources of a gift or gifts valued at \$360 or more received by, or promised to the official, within 12 months prior to the time the decision is made. This threshold is tied to the gift limit threshold and adjusted every two years.
- Personal finances of an official or of his/her immediate family. "Immediate family" means the spouse and dependent children.



## *Step 3: New Rule Domestic Partners*

- A public official's "immediate family" includes the official's spouse and dependent children. (§ 82029.)
- For purposes of this title and implementing regulations, the term "spouse" shall include *registered* domestic partners recognized by state law. (§ 18229.)



*The **next three steps (steps 4, 5 and 6)** identify whether there will be a reasonably foreseeable MFE on the economic interest.*

4. Determine whether the official's economic interests will be directly or indirectly involved.
5. Select the appropriate standard for determining whether the financial impact of the decisions on the official's economic interest will be material.
6. Determine whether it is reasonably foreseeable that the materiality standard will be satisfied for any particular economic interest.



## *Other Conflict/Ethics Laws*

- Conflict of interest limitations on state contracts. (PCC §§ 10410 & 10411)
- Constitutional prohibition on the acceptance of passes and discounts from transportation companies.
- Incompatible activities for state and local officers/employees.
- Common law doctrine of incompatible offices.
- Common law conflicts of interests and Government Code § 1090.

## *Government Code § 1090*

"Government Code § 1090 codified the common law prohibition of public officials having a financial interest in contracts they make in their official capacities...."

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*Breakzone Billiards v.  
City of Torrance* (2000)  
81 Cal.App.4<sup>th</sup> 1205.



# *Who is Covered by § 1090*

Applies to *virtually all state and local*  
(whether elected or appointed):

- *Officers*
- *Employees and*
- *Multimember bodies (such as boards or commissions).*

## *Contract Requirement*

For the prohibition of § 1090 to apply, there must be a contract (including oral contracts and purchases made outside of the formal contract process, and grants). An official *participates* in the making of a contract if the official is involved in its preparation *at any stage* in the process.



## *Disqualification as a Remedy*

- Certain officials may avoid a violation of §1090 by *disqualifying* themselves from participation in the making of the contract.
- Members of multimember bodies are *presumed* to participate in the making of all contracts made by that body. If a member has a financial interest in a contract, § 1090 provides that the contract cannot be made even if the member abstains.



## *"Financial Interest" is Broadly Defined*

- § 1090 does not define when an official is *financially interested* in a contract. Under § 1090, financial interests are often defined in terms of *relationships*.
- The term "financial interest" for purposes of § 1090 has not been construed to have the same meaning as "financial interest" as defined in the Act.



## § 1090 *Exceptions*

- Several limited exceptions permit a financially interested member to disqualify himself/herself and allow the board to enter into the contract.
- If a person has previously entered into a contract with an agency prior to appointment to the agency board, the contract is not affected. Section 1090 *would* apply to any modification, option, renewal or extension of the contract.



# *Penalties*

- A contract made in violation of § 1090 is void.
- Any payments made to the contracting party, under a contract made in violation of § 1090 must be returned and no claim for future payments under such contract may be made. In addition, the public entity is entitled to retain any benefits which it receives under the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633.)



## *Felony Penalty*

- *Willfully* violation (purposeful conduct and with knowledge of his or her financial interest in the contract -- *People v. Honig, supra*, 48 Cal.App.4th 289) any of the provisions of §§ 1090 et seq., is punishable by a fine of not more than \$1,000 or imprisonment in state prison. (§ 1097.)
- Additionally, such an individual is forever disqualified from holding any office in this state. (§ 1097.)

*If both § 1090 and the PRA are violated, what are the possible consequences?*



## ***§ 1090***

Violation of § 1090 can lead to:

- A void contract.
- The state retaining benefit and the contractor having to return any payment received.
- A felony conviction.
- Permanent loss of office in California.

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## ***PRA***

- Administrative fines (\$5,000 fine per violation).
- Civil penalties (in some cases treble damages).
- Criminal penalties (misdemeanor criminal sanctions).
- Voidable contract.

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## *Identifying the Problem*

"The Commission recognized that the two laws overlap, so that there are circumstances where only disqualification of the official is required under the Act, but the contract was completely prohibited under § 1090. In addition, some contracts prohibited under § 1090 do not even require disqualification under the Act."

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October 25, 1985 Commission  
Memorandum on Possible  
Incorporation of §1090 into the Act



## *More on the Problem*

"This can result in [FPPC] staff advising an official that a contract is not prohibited, or that disqualification is not required by the ... Act, when, in fact, the staff suspects that the contract may be absolutely prohibited by § 1090. This situation causes confusion to officials and to members of the public alike. However, because § 1090 is not part of the Act, the [FPPC] cannot give advice under § 1090."



## *And Still More Concerns ....*

- § 1090 will continue to apply in some instances where the Act does not, and vice versa. In other circumstances, the laws will overlap but the conduct required under each would differ.
- Officials subject to § 1090 would have no avenue for obtaining definitive advice regarding compliance with its provisions. (the Attorney General is the only centralized source of advice -- that office does not write opinions for certain city/local officials.)
- Enforcement of § 1090 would remain exclusively the dominion of district attorneys, with felony criminal sanctions available to them.



# *Four Options Presented in 1985*

## (1) Retain the Status Quo.

## (2) Incorporate § 1090 *Intact* into the Act:

- **Pros:** This would provide "one-stop-shopping." FPPC advice could give an official certain types of personal immunity from criminal prosecution or other penalties, but would not prevent a court from declaring a contract to be void.
- **Cons:** All of the inconsistencies between § 1090 and the Act would remain. [Cont.]



**(3) Incorporate and Blend § 1090 into the Act with Minor Revisions.** Make minor changes to blend the two laws into a more harmonious unit.

**(4) Incorporate and Substantially Revise § 1090.** Establish two classes of conflicts of interest -- those which would be treated as felonies and which would automatically make a contract or other governmental action void (along the lines of current § 1090), and those less serious conflicts of interest which would be treated as misdemeanors, and which would not automatically result in the action being void.



## *Demise of the 1985 Effort*

- Opposition by the California District Attorneys Association.
- Opposition by the California Supervisor's Association of California.
- The FPPC decided not to pursue the effort before it became legislation.

## *The 1090/PRA Overlap Continues*

- 229 FPPC Advice Letters cautioning about possible application of § 1090 since 1990.
- 13 appellate court cases refer to both the PRA and § 1090.
- 47 opinions of the Attorney General refer to both the PRA and § 1090.



## *42 News Headlines Reflecting the 1090/PRA Overlap*

- "Orange City Council Seeks To Recover More Than \$100,000 From Former Commissioner Don Greek And His Engineering Companies."
- "Malcolm admits he violated law; Ex-Port District official's plea may yield prison time."
- "Garofalo's Service On The Board Of The City's Visitors Bureau At The Time His Firm Was Awarded A Publishing Contract Is Questioned."



## *The McPherson Commission*

In January 1, 1999, the Bipartisan Commission on the PRA was created. Their final report recommended:

"[T]hat the Legislature consolidate all conflicts of interest laws into one Code, presumably the Political Reform Act, to be interpreted and enforced consistently by a single authority." (Recommendation No. 16)



## *Assembly Bill 1558 (Wolk)*

- Give the FPPC authority to issue opinions with regard to the provisions that concern financial interests of public officials and employees in contracts.
- It would provide procedures for the issuance of these opinions, and would make reliance on advice in one of these opinions evidence of good faith in any civil proceeding, as specified.
- It would specify that the FPPC shall have no enforcement authority.



## *Specific Provisions*

1. Any person may request the FPPC to issue an opinion with respect to his or her duties under §§ 1090, 1091, 1091.1, 1091.2, 1091.3, 1091.4, and 1091.5.
2. The FPPC shall, within 14 days, either issue the opinion or advise the person who made the request whether an opinion will be issued.

[Cont.]



## *Specific Provisions [Cont.]*

3. The FPPC shall forward a copy of the opinion request to the AG's office, the local DA, and agency legal counsel for consultation prior to proceeding with a draft opinion.
4. When issuing the opinion, the FPPC shall either provide to the requestor a copy of any written communications submitted by the AG or a local DA regarding the opinion or advise the person that no such written comments were submitted.

[Cont.]



## *Specific Provisions [Cont.]*

5. The opinion, when issued, shall be evidence of good faith conduct in any civil proceeding regarding these provisions, if the requester disclosed truthfully all the material facts, and committed the acts complained of in reliance on the opinion.
6. The FPPC's opinions shall be public records and may from time to time be published.



# *Resources*

For a copy of the Political Reform Act, regulations, fact sheets, Commission meeting materials, or general information:

- **Visit the Commission's web site ([www.fppc.ca.gov](http://www.fppc.ca.gov)).**
- **Call (866) ASK-FPPC (Toll-free) or (916) 322-5660.**

The Commission's advice letters are available on the legal research services Westlaw and Lexis-Nexis.